

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

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Telephone Number:

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PLR-143386-07

Date:

July 13, 2009

LEGEND

Company =

Trust =

A =

B =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Year =

Dear :

This letter responds to the letter dated September 20, 2007, and subsequent correspondence, submitted on behalf of Company requesting a ruling under § 1362(f) of the Internal Revenue Code.

FACTS

Company was incorporated under the laws of State on Date 1. On Date 2, A and B executed a trust agreement creating the Trust. After A's death on Date 3, a portion of A's assets, including shares in Company, passed to the Trust.

On Date 4, Company elected to be treated as an S corporation, effective Date 5. On Date 5, Trust was a shareholder of Company. Trust failed to make a timely election to be treated as an Electing Small Business Trust (ESBT). Company's legal counsel discovered the omission early in Year. Legal counsel also discovered that Trust inadvertently omitted its consent to Company's S corporation election. Thus, on Date 5, the Trust was an ineligible shareholder of Company, and therefore, Company's S corporation election was invalid.

Company represents that Company and its shareholders have at all times intended Company to be an S corporation since its election, effective Date 5, and that Company and its shareholders have treated themselves consistently with S corporation status. Company further represents that the failure of Trust to file a timely ESBT election was not motivated by tax avoidance or retroactive tax planning. In addition, Company represents that, other than the failure to file an ESBT election for Trust, Company has met the definition of an S corporation under § 1361(a)(1). Company and all of its shareholders consent and agree to make any adjustments consistent with the treatment of Company as an S corporation as may be required by the Secretary under § 1362(f).

LAW

Section 1361(a) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for such year.

Section 1361(b)(1) provides that the term "small business corporation" means a domestic corporation which is not an ineligible corporation and which does not (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1361(c)(2)(A)(v) provides that, for purposes of § 1361(b)(1)(B), an electing small business trust may be a shareholder of an S corporation.

Section 1361(c)(2)(B)(v) provides that, for purposes of § 1361(b)(1), in the case of an electing small business trust, each potential current beneficiary of such trust shall be treated as a shareholder; except that, if for any period there is no potential current beneficiary of such trust, such trust shall be treated as the shareholder during such period.

Section 1361(e)(1)(A) provides that except as provided in § 1361(e)(1)(B), the term "electing small business trust" means any trust if (i) such trust does not have as a beneficiary any person other than (I) an individual, (II) an estate, (III) an organization described in paragraph (2), (3), (4), or (5) of § 170(c), or (IV) an organization described in § 170(c)(1) which holds a contingent interest in such trust and is not a potential current beneficiary, (ii) no interest in such trust was acquired by purchase, and (iii) an election under this subsection applies to such trust.

Section 1362(a)(1) provides, in general, that except as provided in § 1362(g), a small business corporation may elect, in accordance with the provisions of § 1362, to be an S corporation.

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the 1st day of the 1st taxable year for which the corporation is an S corporation) such corporation ceases to be a small business corporation.

Section 1362(f) provides that if (1) an election under § 1362(a), 1361(b)(3)(B)(ii), or § 1361(c)(1)(A)(ii) by any corporation was not effective for the taxable year for which made (determined without regard to § 1362(b)(2)) by reason of a failure to meet the requirements of § 1361(b) or to obtain shareholder consents, or was terminated under § 1362(d)(2) or § 1362(d)(3), § 1361(b)(3)(C), or § 1361(c)(1)(D)(iii), (2) the Secretary determines that the circumstances resulting in such ineffectiveness or termination were inadvertent, (3) no later than a reasonable period of time after discovery of the circumstances resulting in such ineffectiveness or termination, steps were taken (A) so that the corporation for which the election was made or the termination occurred is a small business corporation or a qualified subchapter S subsidiary, as the case may be, or (B) to acquire the required shareholder consents, and (4) the corporation for which the election was made or the termination occurred, and each person who was a shareholder in such corporation at any time during the period specified pursuant to this subsection, agrees to make such adjustments (consistent with the treatment of such corporation as an S corporation or a qualified subchapter S subsidiary, as the case may be) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such ineffectiveness or termination, such

corporation shall be treated as an S corporation during the period specified by the Secretary.

Section 1.1362-4(b) of the Income Tax Regulations provides that, for purposes of § 1.1362-4(a), the determination of whether a termination was inadvertent is made by the Commissioner. The corporation has the burden of establishing that under the relevant facts and circumstances the Commissioner should determine that the termination was inadvertent. The fact that the terminating event was not reasonably within the control of the corporation and was not part of a plan to terminate the election, or the fact that the event took place without the knowledge of the corporation, notwithstanding its due diligence to safeguard itself against such an event, tends to establish that the termination was inadvertent.

Section 1.1362-4(d) provides that the Commissioner may require any adjustments that are appropriate. In general, the adjustments required should be consistent with the treatment of the corporation as an S corporation during the period specified by the Commissioner.

CONCLUSION

Based on the facts submitted and representations made, we conclude that Company's S corporation election effective Date 5 was invalid due to Trust's failure to make a timely ESBT election, and Trust's failure to consent to the S corporation election. We also conclude that the termination was inadvertent within the meaning of § 1362(f). Consequently, under the provisions of § 1362(f), Company will be treated as an S corporation from Date 5 and thereafter, provided that Company's S corporation election is valid and is not otherwise terminated under § 1362(d).

This ruling is contingent on Trust filing the appropriate ESBT election and consenting to Company's S corporation election within 60 days of the date of this letter. A copy of this letter must be attached to the election. Accordingly, Company's shareholders in determining their federal tax liability for years that are open with respect to both B and Trust must include their pro rata share of separately and nonseparately computed items of Company under § 1366, make any adjustments to stock basis under § 1367, and take into account any distributions pursuant to § 1368.

Except for the specific rulings above, no opinion is expressed or implied concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, no opinion is expressed or implied as to whether Company otherwise qualifies as a subchapter S corporation under § 1361. In addition, no opinion is expressed as to whether Trust qualifies as an ESBT under § 1361(e).

Under a power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

/s/

Leslie H. Finlow
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)

Copy of this letter

Copy for § 6110 purposes